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No. 88-1466

# In the Supreme Court of the United States

OCTOBER TERM, 1988

PEOPLE OF ENEWETAK, RONGELAP, AND OTHER MARSHALL ISLANDS ATOLLS, PETITIONERS

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the Claims Court correctly dismissed petitioners' Tucker Act suits seeking damages for alleged takings of property and breach of implied-in-fact contractual obligations arising out of the nuclear testing program in the Marshall Islands between 1946 and 1958, on the ground that the Compact of Free Association between the United States and the Government of the Marshall Islands settled those claims and bars United States courts from exercising jurisdiction over them.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals on the consolidated appeals (Pet. App. 1a-6a) is reported at 864 F.2d 134. The opinions of the United States Claims Court in *Peter* v. *United States* (Pet. App. 8a-10a), *Nitol* v. *United States* (Pet. App. 11a-13a), and *Juda* v. *United States* (Pet. App. 14a-61a) are reported at 13 Cl. Ct. 691, 690 and 667, respectively.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 7a) was entered on December 8, 1988. The petition for a writ of certiorari was filed on March 8, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Petitioners, who are citizens of the Republic of the Marshall Islands, seek to invalidate the claims-settlement provisions of the Compact of Free Association between the United States and the Government of the Marshall Islands. The Compact recognizes the people of the Islands as self-governing and defines the relations between the two Governments. In Section 177(a) of the Compact, the United States "accepts the responsibility for compensation owing to citizens of the Marshall Islands" for losses resulting from the nuclear testing program conducted by the United States in the Northern Marshall Islands between 1946 and 1958.[1] To implement that commitment, the United States entered into an agreement with the Government of the Marshall Islands (the "Section 177 Agreement") settling all claims based on the testing program and paid $150 million to the Marshall Islands in October 1986 to establish a permanent compensation Fund. The Section 177 Agreement provides that United States courts shall have no jurisdiction to entertain such claims. Petitioners, who had filed suits against the United States seeking to recover for losses allegedly resulting from the nuclear testing program, now challenge both the jurisdictional bar and the authority of their own government to espouse and settle their claims against the United States. The court of appeals held that petitioners' suits are barred (Pet. App. 1a-6a). In a related case involving many of the same plaintiffs, the District of Columbia Circuit similarly held that the jurisdictional bar requires dismissal of Federal Tort Claims Act suits against the United States arising out of

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[1] The Compact of Free Association is set forth and approved as Title II of the Compact of Free Association Act, Pub. L. No. 99-239, 99 Stat. 1770. Section 177 of the Compact is reproduced at App., *infra*, 1a-2a.

the nuclear testing program. *Antolok* v. *United States,* No. 87-5324 (Apr. 28, 1989).

1. These cases are individual Tucker Act suits against the United States by citizens of the Marshall Islands, seeking to recover for takings of property and breaches of implied-in-fact contractual duties that allegedly resulted from the nuclear testing program conducted at Bikini and Enewetak Atolls pursuant to the Atomic Energy Act of 1946, ch. 724, 60 Stat. 755. The complaints in *Juda* v. *United States* and *Peter* v. *United States* were filed in 1981 and 1982 on behalf of inhabitants of Bikini and Enewetak, respectively. Twelve other actions, consolidated under the caption *Nitol* v. *United States,* were filed in 1981 and 1982 on behalf of some inhabitants of Rongelap and Utrik and other areas in the Marshall Islands downwind from the test sites.[2]

2. Prior to World War II, the Marshall Islands were administered by Japan under a League of Nations mandate. At the end of World War II, the United States liberated the Islands from Japan. In 1947, the United States and the United Nations Security Council approved a Trusteeship Agreement that designated the United States as "administering authority" for a Trust Territory comprised of the Marshall Islands and several other Pacific Island groups. The Trusteeship Agreement granted the United States full powers over the Territory and obligated it to promote self-government in accordance with the freely expressed wishes of the peoples concerned. Pet. App. 19a-22a.

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[2] Most plaintiffs in the *Nitol* cases are also plaintiffs in the *Antolok* case in the District of Columbia Circuit or a similar case pending in the Ninth Circuit, *Antolok* v. *Brookhaven National Laboratories,* No. CV 82-2364 (C.D. Cal. Jan. 6, 1988), appeal pending, No. 88-5749 (9th Cir.). Proceedings on appeal in the latter case were stayed pending resolution of the D.C. Circuit case. References herein to "*Antolok*" are to the opinion in the D.C. Circuit case.

During the 1960s, the United States initiated steps to foster self-government of the Territory.[3] The people of the Marshall Islands approved a constitution, in a United Nations-observed referendum on March 1, 1979, and inaugurated parliamentary government on May 1, 1979. On April 25, 1979, the Secretary of the Interior, on behalf of the United States, recognized the constitutional government of the Republic of the Marshall Islands, and delegated most executive, legislative and judicial functions to the new government, subject to the retention by the United States of residual authority necessary to ensure its ability to meet its underlying trusteeship obligations. Pet. App. 22a-23a.

3. Following lengthy government-to-government negotiations, the Republic of the Marshall Islands and the United States signed the Compact of Free Association on June 25, 1983. The Compact recognizes that the people of the Marshall Islands are "sovereign," and, acting through their constitutional government, are "self-governing" (99 Stat. 1800, 1801). In Section 177(a) of the Compact, the "Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands * * * for loss or damage to property and person" resulting from the nuclear testing program (App., *infra,* 1a). Section 177(b) requires the two Governments to enter into a separate agreement providing "for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which

[3] At that time, the United States encouraged, and the Trust Territory residents explored, the possibility of commonwealth or United States territorial status for the various islands groups. However, in a series of United Nations-observed plebiscites, the residents determined to form four separate political entities for the development of constitutional self-government, one of which is the Republic of the Marshall Islands. Pet. App. 22a.

have not as yet been compensated or which in the future may arise" (*ibid.*). Section 177(c) obligates the United States to provide $150 million to the Marshall Islands to fund that Agreement (App., *infra*, 2a).[4]

The purpose of the Section 177 Agreement is "to create and maintain, in perpetuity, a means to address past, present and future consequences of the Nuclear Testing Program, including the resolution of resultant claims" (Preamble (C.A. App. 331)). The Agreement thus requires the United States to pay $150 million to the Marshall Islands to create a permanent investment Fund, with compensation to be paid out of the annual proceeds (Art. I (C.A. App. 332-333)).[5] Because the Agreement contains no termination provision, the Fund as now constituted will continue in existence permanently to satisfy compensation needs, absent formal amendment of the Compact and Agreement by the two Governments.

To address the long-term problems stemming from the testing program, the Section 177 Agreement requires compensation to be made in several forms. First, it provides $2 million annually over a 15-year period for health-care programs, and an additional $1 million annually over the ini-

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[4] The United States had previously addressed the consequences of the testing program on an *ad hoc* basis under 14 separate statutes, set forth in Appendix A to the Agreement, which dealt with island rehabilitation, agricultural maintenance, medical treatment, compensation for injuries and loss of property, radiological monitoring, and claims settlement. We have been informed by the Department of State that the United States furnished approximately $150 million under those statutes over a 20-year period. The Compact and Section 177 Agreement, at issue here, furnish an *additional* $150 million to establish the first comprehensive and integrated means of addressing these needs on a permanent basis.

[5] The Fund's principal may be drawn upon only if income fails to meet annual distribution schedules (Art. II, § 7(a) (C.A. App. 336)).

tial three-year period for medical surveillance and radiological monitoring (Art. II, § 1 (C.A. App. 333-334)). Further, in recognition of the fact that atoll residents were relocated and affected as a community, and that there are unique community needs that are best determined locally, the Agreement also provides for payments of $183.75 million, over 15 years, to the local governmental councils for Bikini, Enewetak, Rongelap and Utrik, which serve as "Distribution Authorities" under the Agreement.[6] In accordance with local custom and Marshallese law, the Distribution Authorities use the funds to make per capita payments to individual residents or for local community needs (Art. II, §§ 2-5; Art. III (C.A. App. 337)). In addition, under agreements between the Government of the Marshall Islands and the Distribution Authorities, some of the funds are placed in trust or otherwise invested to promote the long-term financial security of the community concerned (Art. II, § 8 (C.A. App. 336-337)). Finally, as "an additional long-term means for compensating claims," the Agreement establishes a Claims Tribunal to adjudicate any additional uncompensated claims of individual inhabitants, and it provides $45.75 million over the first 15 years of the Compact's existence for such awards (Art. II, § 6; Art. IV (C.A. App. 335, 338-339)). At the end of the initial 15-year period, when payments to the Distribution Authorities for the atolls end, the Agreement commits at least 75% of the annual proceeds of the permanent Fund (a projected $13.5 million annually) for awards by the Claims Tribunal (Art. II, § 7(c) (C.A. App. 336)).

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[6] The disbursements required by Article II are as follows: $75 million to the people of Bikini, who now number approximately 1300; $48.75 million to the approximately 900 people of Enewetak; $37.5 million to the 450 people of Rongelap; and $22.5 million to the 800 people of Utrik.

Article X of the Section 177 Agreement, entitled "Espousal," affirms that the Agreement was entered into on the basis of the espousal of claims by the Government of the Marshall Islands and constitutes a full settlement by the Marshall Islands of all such claims. Article X provides (Pet. App. 63a-64a):

> This Agreement constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, its agents, employees, contractors and citizens and nationals, and of all claims for equitable or any other relief in connection with such claims including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including the courts of the Marshall Islands and the courts of the United States and its political subdivisions.

Finally, Article XII of the Section 177 Agreement, entitled "United States Courts," provides (Pet. App. 65a):

> All claims described in Articles X and XI of this Agreement shall be terminated. No court of the United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

4. The people of the Marshall Islands approved the Compact of Free Association, including the Section 177 Agreement, in a September 1983 plebiscite monitored by the United Nations Trusteeship Council (Pet. App. 24a; *Antolok*, slip op. 5). Congress approved the Compact and the Section 177 Agreement in the Compact of Free Association Act, which was approved by the President on January 14, 1986. Pub. L. No. 99-239, 99 Stat. 1770. Section 103(g) of that Act reiterates that the Section 177

Agreement constitutes a full and final settlement of all claims (99 Stat. 1782):

> (g) ESPOUSAL PROVISIONS.—(1) It is the intention of the Congress of the United States that the provisions of section 177 of the Compact of Free Association and the Agreement between the Government of the United States and the Government of the Marshall Islands for the Implementation of Section 177 of the Compact (hereafter in this subsection referred to as the "Section 177 Agreement") constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement.
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> (2) In furtherance of the intention of Congress as stated in paragraph (1) of this subsection, the Section 177 Agreement is hereby ratified and approved. It is the explicit understanding and intent of Congress that the jurisdictional limitations set forth in Article XII of such Agreement are enacted solely and exclusively to accomplish the objective of Article X of such Agreement and only as a clarification of the ef ect of Article X, and are not to be construed or implemented separately from Article X.

5. On May 28, 1986, the United Nations Trusteeship Council formally declared that the peoples of the Marshall Islands "have freely exercised their right to self-determination * * * and have chosen free association with the United States of America"; and that the United States "has satisfactorily discharged its obligations under the terms of the Trusteeship Agreement" (Pet. App. 30a (C.A. App. 1222)). On October 10, 1986, the United States and the Marshall Islands executed an agreement that the Compact would enter into force on October 21, 1986; and on November 3, 1986, the President issued Proclamation No.

5564, which announced that the United States "has fulfilled its obligations under the Trusteeship Agreement" and that, with respect to the Marshall Islands, the Trusteeship Agreement "is no longer in effect as of October 21, 1986" (*id.* at 30a, 32a).

6. a. Following approval of the Compact, the United States moved to dismiss the remaining claims in these consolidated cases on the ground that the Compact and Section 177 Agreement divested the Claims Court of jurisdiction to entertain them.[7] The Claims Court granted the government's motion in an opinion dated November 10, 1987 (Pet. App. 14a-61a), holding that the "consent of the United States to be sued in the Claims Court on plaintiffs' taking claims and breach of contract claims that arise from the United States' nuclear testing program in the Marshall Islands has been withdrawn" (*id.* at 61a). The

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[7] Prior to approval of the Compact, the United States filed motions to dismiss the complaints in all cases. The Claims Court held in 1984 that the *Peter* complaint stated claims for breach of implied contract, but that the statute of limitations barred the plaintiffs' taking claims. *Peter* v. *United States*, 6 Cl. Ct. 768, 775, 778 (Cl. Ct. 1984). The court held in *Nitol* that plaintiffs could maintain taking claims, but that the complaint alleged insufficient facts to support implied-in-fact contract claims. Plaintiffs in *Nitol* did not appeal the latter holding. The court found that the *Juda* complaint stated taking and breach of implied contract claims. *Juda* v. *United States*, 6 Cl. Ct. 441, 449-458 (Cl. Ct. 1984).

In its motion to dismiss filed after approval of the Compact, the United States also asserted that these actions raised a nonjusticiable political question, by contesting the authority of sovereign governments to settle claims incident to diplomatic recognition, as well as the United States' authority to recognize foreign governments for purposes of settlement. See *United States* v. *Belmont*, 301 U.S. 324, 328-332 (1937); *United States* v. *Pink*, 315 U.S. 203, 226-230 (1942); *Shanghai Power Co.* v. *United States*, 4 Cl. Ct. 237, 248 (1983), aff'd without opinion, 765 F.2d 159 (Fed. Cir.), cert. denied, 474 U.S. 909 (1985). The Claims Court did not rule on the political question issue in dismissing on jurisdictional grounds, nor did the court of appeals in affirming.

court specifically rejected petitioners' contention that Congress conditioned the withdrawal of jurisdiction on a judicial determination that the diplomatic espousal of petitioners' claims by the Government of the Marshall Islands was consistent with international law (*id.* at 48a-55a). It also held that Congress has full authority under the Constitution to establish an alternate method of compensation for particular claims and to withdraw Tucker Act juridiction over those claims (*id.* at 59a). In this case, the court observed, "Congress, in the Compact Act, has recognized and adopted a procedure that it believes provides a means for final discharge of constitutional obligations for just compensation" (*id.* at 60a). For this reason, the court concluded that any challenge to the adequacy of the permanent compensation program would be "premature," and that it therefore "cannot be challenged judicially until it has run its course" (*ibid*).

b. The court of appeals affirmed (Pet. App. 1a-6a), specifically adopting the Claims Court's "more extensive analysis" of the jurisdictional issue (*id.* at 6a).[8] The court recognized that the Compact and Section 177 Agreement

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[8] While the appeals were pending, the plaintiffs in *Juda* voluntarily dismissed their appeal with prejudice. *People of Bikini* v. *United States*, 859 F.2d 1482 (Fed. Cir. 1988); see Pet. App. 2a n.1. This dismissal was in conjunction with implementation of Section 1 of Article VI of the Section 177 Agreement (C.A. App. 340) and Section 103(*l*) of the Compact Act, 99 Stat. 1786, and the appropriation by Congress of $90 million for that purpose. Those special provisions committed Congress to fund the costs of resettling Bikini by the people of Bikini out of future appropriations, rather than the $150 million compensation Fund at issue in this case. The Compact and Section 177 Agreement do not contain any comparable provisions committing the United States to furnish special funds for the people of other Atolls, in addition to the specific payments already prescribed by the terms of the settlement.

"provide, in perpetuity, a means to address past, present and future consequences, including the resolution of individual claims," and it was "unpersuaded that judicial intervention is appropriate at this time on the mere speculation that the alternative remedy may prove to be inadequate" (*id.* at 5a). In the court's view, a "fall back" Tucker Act remedy is not necessary "to sustain the constitutionality of every alternative procedure for compensation" (*ibid.*). In particularly, it concluded that where, as here, Congress has provided a permanent mechanism for the full and final discharge of all claims, the determination of the need for any "fallback" remedy is not mandated "in advance of the exhaustion of the alternative provided" (*ibid.*).

## ARGUMENT

The court of appeals correctly affirmed the Claims Court's dismissal of petitioners' claims on the ground that the Compact of Free Association Act and the Section 177 Agreement bar United States courts from entertaining those claims. The judgment below is consistent with the holding by the District of Columbia Circuit in *Antolok* v. *United States,* No. 87-5324 (Apr. 28, 1989), which held that tort suits brought by many of the same plaintiffs likewise are barred by the Compact Act and Section 177 Agreement. Moreover, petitioners concede that the settlement and preclusion provisions of the Compact and Section 177 Agreement are valid if the Government of the Marshall Islands could properly espouse the claims of its citizens. As Chief Judge Wald concluded in her concurring opinion in *Antolok,* that espousal was fully consistent with international law and custom. At the very least, Congress constitutionally could determine that the settlement at issue here, based on such an espousal by the Government of the Marshall Islands, was just and proper. For

these reasons, the courts below properly declined to invalidate the claims-settlement provisions of the Compact of Free Association, which was approved by the people of the Marshall Islands in a plebiscite recognized by the United Nations Trusteeship Council as a valid act of self-determination and was then approved by the Congress and President of the United States. Further review of this diplomatic undertaking is not warranted.

1. Petitioners argue (Pet. 10-13) that the court of appeals erred as a matter of statutory construction in concluding that the instant suits must be dismissed for lack of jurisdiction. Congress, however, could not have been clearer that these suits must be dismissed.

a. Article X of the Section 177 Agreement, which is entitled "Full Settlement of All Claims," states that the Agreement "constitutes the full settlement of all claims, past, present and future, of the Government, citizens and nationals of the Marshall Islands which are based upon, arise out of, or are in any way related to the Nuclear Testing Program, and which are against the United States, * * * including any of those claims which may be pending or which may be filed in any court or other judicial or administrative forum, including * * * the courts of the United States and its political subdivisions" (Pet. App. 63a-64a). Article XII of the Section 177 Agreement, entitled "United States Courts," then states (Pet. App. 65a):

> All claims described in Articles X and XI of this Agreement [9] shall be terminated. No court of the

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[9] Article XI obligates the Government of the Marshall Islands to indemnify the United States, up to a maximum of $150 million, if the United States should be held liable for any claims covered by Article X. Pet. App. 64a. Article XI represents an undertaking by the Government of the Marshall Islands faithfully to meet its commitments under the Compact and Section 177 Agreement, and it was included as a reciprocal measure in recognition of the irrevocable commitment by the United States to pay the Government of the Marshall

> United States shall have jurisdiction to entertain such claims, and any such claims pending in the courts of the United States shall be dismissed.

The Section 177 Agreement, including this provision depriving United States courts of jurisdiction and requiring dismissal of all pending suits, is incorporated into the Compact by Section 177(c) thereof (99 Stat. 1812). The Compact itself in turn was enacted into United States law by Title II of the Compact of Free Association Act (99 Stat. 1800).[10] Pursuant to these unambiguous provisions of law, the courts below correctly held that petitioners' claims are "terminated" in United States courts and must be dismissed for lack of jurisdiction.

Congress reiterated its purpose to terminate this litigation in Title I of the Compact of Free Association Act, which, inter alia, sets forth the legal and policy positions of the United States regarding the Compact that was enacted by Title II of the Act. Specifically, Section 103(g)(1) of the Act states that "[i]t is the intention of the Congress" that Section 177 of the Compact and the Section 177 Agreement "constitute a full and final settlement of all claims described in Articles X and XI of the Section 177 Agreement, and that any such claims be terminated and barred except insofar as provided for in the Section 177 Agreement" (99 Stat. 1782). Because all claims described in Article X of the Agreement are "terminated and barred" ("except" that they are to be paid out of the $150 million Fund "as provided for in the Section 177 Agreement"), petitioners' claims are "terminated and barred" in United States courts. Section 103(g)(2) of the Act further under-

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Islands $150 million to create the Fund in full and final settlement of all such claims.

[10] See also Section 101(d)(2)(C) of the Act, which states that the Section 177 Agreement is "incorporated by reference into the Compact" (99 Stat. 1773-1774).

scores Congress's purpose in this regard by stating that the Section 177 Agreement—necessarily including the jurisdictional bar in Article XII—"is hereby ratified and approved" in "furtherance of the intention of Congress as stated in paragraph (1)," which is to accomplish a "full and final settlement" of all claims. Therefore, Section 103(g)(1) and (2) of the Compact of Free Association Act, like Section 177 of the Compact and the Section 177 Agreement, clearly required dismissal of petitioners' suits.

b. Petitioners argue, however, that the jurisdictional preclusion in Article X of the Section 177 Agreement should not be given effect by a United States court unless the court first determines that the espousal of their claims by the Government of the Marshall Islands was valid. Nothing in the provisions just quoted conditions the jurisdictional preclusion in this manner. To the contrary, those provisions establish that Congress and the Government of the Marshall Islands intended the comprehensive settlement in the Compact and Section 177 Agreement to result in the *automatic* dismissal of claims pending in United States courts, without any second-guessing of the settlement by the courts.

Petitioners nevertheless insist (Pet. 11-13) that the second sentence of Section 103(g)(2) required the courts below to pass on the validity of the espousal before dismissing their claims. "The short answer to [petitioners'] argument that this is the meaning of Section 103(g)(2) is: This is not what the statute says." *Antolok,* slip op. 13. The second sentence of Section 103(g)(2) states (99 Stat. 1782):

> It is the explicit understanding and intent of Congress that the jurisdictional limitations set forth in Article XII of such Agreement are enacted solely and exclusively to accomplish the objective of Article X of such Agreement and only as a clarification of the effect of

> Article X, and are not to be construed or implemented separately from Article X.

Nothing in this sentence suggests an intention on the part of Congress to authorize or require a court to pass on the validity of the espousal as a matter of international law before dismissing claims covered by Article X of the Agreement. To the contrary, this sentence confirms, in unconditional language, that the "jurisdictional limitations" in Article XII "are enacted." Furthermore, the decision below is fully consistent with the other language Congress used in the second sentence of Section 103(g)(2). The Claims Court, affirmed by the court of appeals, dismissed petitioners' claims solely in order to "accomplish the objective" of the full and final settlement of those claims mandated by Article X of the Agreement, and it therefore did not "construe[] or implement[]" the jurisdictional limitations "separately from Article X."

Thus, there is no support in the second sentence of Section 103(g)(2) for the proposition that the dismissal that was unconditionally required by the Section 177 Agreement, by the Compact, and by other provisions of Section 103(g) itself was made conditional on judicial approval of the espousal of claims by the Government of the Marshall Islands. Nor should such a limitation be lightly implied. The settlement provisions and jurisdictional limitations are part of a Compact that affects important foreign policy and national defense interests of the United States. It was entered into only after extensive negotiations and was ratified by Congress only after it had been approved in a United Nations-recognized plebiscite of the people of the Marshall Islands. It is inconceivable that Congress would have unilaterally amended such a bilateral agreement, and made the effectiveness of a *diplomatic* undertaking contingent upon *judicial* approval, without expressly stating its intention to do so. Accord *Antolok*, slip op.

14 ("if Congress had meant to condition this important international agreement on a review of a fundamental provision therein by the courts, it surely could have included language to that effect"); *Antolok* v. *Brookhaven National Laboratories,* No. CV 82-2364 (C.D. Cal. Jan. 6, 1988), slip op. 8 ("If Congress wanted to first have courts test the Compact, it could have said so; instead Congress stripped the courts of jurisdiction."), appeal pending, No. 88-5749 (9th Cir.).

There is, moreover, no need to speculate on the point, because Congress in fact rejected language that would have expressly conditioned Article XII's withdrawal of consent to suit on judicial approval of the espousal of petitioners' claims by the Government of the Marshall Islands. An alternative to paragraph (2) of Section 103(g), which was drafted by Representative Seiberling and passed by the House of Representatives as part of an early version of the Compact legislation on July 25, 1985, would have provided (Pet. App. 49a-50a):

> (2) If, notwithstanding the enactment into law of this joint resolution, a United States court of competent jurisdiction determines that the provisions of Article X of the [Section 177 Agreement] are invalid as a matter of international law or for any other reason, the provisions of Article XII * * * shall not, of themselves, prevent any court of the United States otherwise having jurisdiction over claims described in Articles X and XI * * * from entertaining such claims; and the time between the effective date of the Compact and any subsequent final judicial determination of invalidity of Article X * * * shall not be included in any calculations regarding applicable statutes of limitations * * *.

H.R.J. Res. 187, 99th Cong., 1st Sess. § 103(g)(2) (1985), 131 Cong. Rec. 20,643 (1985). In passing the Compact

Act, Congress retained the House-passed paragraph (1) of Section 103(g), which affirmed the "full and final settlement of all claims," but changed paragraph (2). Congress, for example, added an introductory first sentence to paragraph (2) stating that, "[i]n furtherance of the intention of Congress as stated in paragraph (1)," the Section 177 Agreement is "ratified and approved" (Pet. App. 62a). And Congress rewrote the now-second sentence entirely, removing the statement that courts may disregard Article XII if Article X is found invalid—and indeed removing any reference to the validity of espousal, judicial review, or to statute of limitations considerations that might result from judicial review of espousal. Those revisions represent a clear rejection of the very condition now sought by petitioners.

c. Having failed to achieve passage of his proposed statutory language, Representative Seiberling inserted a written extension of remarks into the record of the House debate after its final passage of the bill on December 11, 1985. In those remarks, upon which petitioners base virtually their entire argument that the second sentence of Section 103(g)(2) means something other than what it says (see Pet. 13), Representative Seiberling stated (131 Cong. Rec. 36,032 (1985)):

> The new language is intended to make it clear that court-stripping provisions of article XII of the section 177 agreement have no independent force or effect and their sole function is to implement the provisions of article X. Thus, if article X is valid, espousal stands; and if article X is invalid, claims covered by the espousal provisions will remain justiciable in U.S. courts, regardless of article XII.

These remarks do not expressly state that a United States court may—much less must—pass on the validity of the espousal before dismissing a case pursuant to Article XII

and other provisions of the Agreement, Compact, and Act. Representative Seiberling's remarks merely indicate that *if* Article X should be held invalid at some point, claims covered by that Article would remain justiciable in United States courts. Read in this way, even the remarks upon which petitioners rely do not indicate that the courts below erred in dismissing petitioners' claims at this time, without passing on the validity of the espousal.

In any event, this isolated statement of a Member whose proposed language was specifically rejected by Congress is, to say the least, not a reliable indicator of the intent of Congress as a whole on this issue. Compare *Shell Oil Co.* v. *Iowa Department of Revenue,* 109 S.Ct. 278, 284 (1988) ("This Court does not usually accord much weight to the statements of a bill's opponents."); *Gulf Offshore Co.* v. *Mobil Oil Corp.,* 453 U.S. 473, 483 (1981) (" '[t]he fears and doubts of the opposition are no authoritative guide to the construction of legislation."). That is particularly so here, because, as the Claims Court observed, the terms of Section 103(g)(2) as finally enacted "actually contradict [petitioners'] argument" (Pet. App. 51a). Accord *Antolok,* slip op. 16 ("We cannot find the single statement of even an influential Congressman to overcome the plain language of the statute itself, especially where that statement was not spoken in floor debate but rather inserted into the Congressional record."); see *United States* v. *James,* 478 U.S. 597, 606 (1986).

The force of Representative Seiberling's extension of remarks is further undermined by the section-by-section analysis of the bill prepared by Senator McClure, the principal Senate sponsor of the legislation, which was referred to by the Senator during the Senate's debate on final passage of the bill two days later and which was printed as part of the record of that debate. See *Antolok,* slip op. 17 n.6. The section-by-section analysis responded to the posi-

tion of Representative Seiberling as follows (131 Cong. Rec. 36,468 (1985)):

> (g) Espousal provisions. This provision reiterates the provisions of Section 177 of the Compact which provide that there is full and final settlement of all nuclear effects claims.
>
> In light of the statement made by some more interested in protracted litigation than compensation for the victims of the testing program, both the Senate and House agreed that an explicit endorsement of the resolution was important. Additional ex gratia assistance will be available in the future if circumstances warrant and this provision in no manner lessens the concern which we have for the population of the affected atolls. It is designed to prevent the Marshall Islands from becoming a tropical Bleak House.

This view was confirmed by Senator Johnston during the Senate debate on the appropriation of an additional $90 million in 1988 for the resettlement of Bikini pursuant to a special provision of the Compact. See note 8, *supra*. Senator Johnston stated, with obvious reference to the instant case and the related *Antolok* cases (134 Cong. Rec. S12,008 (daily ed. Sept. 8, 1988)):

> [T]he courts have been urged to assert jurisdiction and review claims covered by the Section 177 Agreement despite clear congressional intent to the contrary. Much has been made in the courts of floor statements by a former Member of the House of Representatives on this issue. However, such statements must be put into perspective. Those statements represent the view of one Member of Congress whose position was not accepted by Congress when it enacted the Compact Act. The intent of Congress is clear on its face in the statutory language of Public Law 99-239, section 103(g).

* * * * *

> I would further note that the language was specifically included in the statute to rebut any indication that enactment of the compact did not constitute a full and final settlement and a complete and absolute bar to either continued or further litigation. * * * The attempts by some to weaken or alter the original language were rebuffed and specifically disclaimed.

d. For the foregoing reasons, petitioners' argument that Congress conditioned the jurisdiction upon a judicial determination of the validity of espousal is without merit.

2. a. Petitioners argue (Pet. 7-10) that Congress could not constitutionally withdraw Tucker Act jurisdiction over their claims without first authorizing the court to determine that the alternative method of compensation provided by the Compact and Section 177 Agreement furnished petitioners with a " 'reasonable, certain and adequate provision for obtaining compensation.' " *Blanchette* v. *Connecticut General Insurance Corp.*, 419 U.S. 102, 124-125 (1974) (*Regional Rail Reorganization Act Cases*), quoting *Cherokee Nation* v. *Southern Kansas R.R.*, 135 U.S. 641, 659 (1890). In petitioners' view, it cannot now be determined that the compensation furnished by the Claims Tribunal in the Marshall Islands will be adequate to pay their taking and implied-in-fact contract claims, and a Tucker Act remedy therefore must be retained to cover any short-fall. There are a number of difficulties with this argument.

First, petitioners expressly concede that "espousal is a recognized mechanism for settling claims under international law and acknowledge that if this espousal complied with the requirements of international law, then their claims have been validly extinguished" (Pet. 12). As Chief Judge Wald explained in her concurring opinion in *Antolok* (slip op. 19-21), the espousal in this case is fully consistent with international law and custom.

Second, it is well settled that Congress may decline to waive the sovereign immunity of the United States, or may withdraw consent to suit that was previously given, even where the underlying claim may be one of constitutional dimension (*Lynch* v. *United States,* 292 U.S. 571, 579-582 (1934)), because "[t]he rule that the United States may not be sued without its consent is all embracing" (*id.* at 581); see also *Schillinger* v. *United States,* 155 U.S. 163, 168 (1894). It follows that the statutory provisions that preclude United States courts from exercising jurisdiction over petitioners' claims do not result in a taking of property, because "consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment" (*Lynch,* 292 U.S. at 581; accord *Antolok,* slip op. 19; *id.* at 19-20 (Wald, C.J., concurring)). Indeed, as the Claims Court observed, "[a]n unbroken line of decisions holds that Congress may withdraw its consent to sue the Government at any time" (Pet. App. 60a). For this reason alone, it was not necessary for the courts below to ascertain the adequacy of the alternative means of compensation before dismissing petitioners' suits pursuant to the explicit statutory command.

Third, if we assume, arguendo, that petitioners' underlying claims against the United States based on breach of an implied-in-fact contract and taking of property on the atolls at the time of the nuclear testing program are distinct property rights, the statutory provisions that required the courts below to dismiss petitioners' suits for lack of jurisdiction did not extinguish or renounce those claims. As the Claims Court observed, "in none of these cases, has Congress abolished [petitioners'] claims. The Compact recognizes the United States' obligations to compensate for damages from the nuclear testing program and the Section 177 Agreement establishes an alternative tribunal to provide such compensation." Pet. App. 58a. Under *Lynch,* it clearly would have been constitutional for Con-

gress to enact only the withdrawal of consent for petitioners to sue the United States, while otherwise leaving their underlying claims unaffected and making no provision for their ultimate resolution. Congress's identical action here is not rendered unconstitutional by virtue of the fact that Congress coupled that action with an *alternative* mechanism for compensating those affected by the nuclear testing program—through the health programs, atoll distributions, and Claims Tribunal provisions of the Section 177 Agreement.

Fourth, petitioners did not in any event amend their complaints following Congress's approval and enactment into law of the Compact and Section 177 Agreement to allege that the claims-settlement agreement extinguished their underlying claims and thereby deprived them of property (their claims against the United States) without just compensation. Their complaints advance only the underlying claims for a taking of property and breach of implied-in-fact contracts in the Marshall Islands. As a result, this case does not properly present the question of a "taking" of the claims that petitioners now seek to raise.

b. Petitioners also err in relying (Pet. 7-9) on *Blanchette* v. *Connecticut General Insurance Corp.*, 419 U.S. 102 (1974), *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), and *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), for the proposition that an ultimate Tucker Act remedy must be available in order to sustain the jurisdictional provisions requiring dismissal of their suits. In those cases, the Court considered the availability of just compensation under the Tucker Act before giving effect to statutory provisions (or, in *Dames & Moore*, an Executive Agreement) that were themselves alleged to constitute a taking of property. Here, by contrast, Congress enacted a jurisdictional bar that required dismissal of petitioners' suits but did not extinguish their underlying claims. Under *Lynch*, that withdrawal of jurisdiction to sue the United States is not, in itself, a taking of property.

Moreover, the measures at issue in *Blanchette, Dames & Moore,* and *Monsanto* took very different forms, and addressed vastly different needs, than did the Compact and Section 177 Agreement. In *Blanchette,* the Court's Tucker Act determination turned on the fact that the compelled continuation of rail operations under the Regional Rail Reorganization Act of 1973 might accelerate erosion of the plaintiffs' interests "through accrual of post-bankruptcy claims having priority over their claims." 419 U.S. at 123-124. "Thus, failure to decide the availability of the Tucker Act would raise the distinct possibility that those plaintiffs would suffer an 'erosion taking' without adequate assurance that compensation will ever be provided." *Id.* at 124. The statute at issue in *Monsanto* mandated an arbitration procedure to determine the amount of compensation owed by pesticide registration applicants to earlier registrants on whose data the applicants rely. 467 U.S. at 1018. Even in finding that the registration statute did not withdraw Tucker Act jurisdiction, the Court held that claimants must first exhaust the required procedure, because "[e]xhaustion of the statutory remedy is necessary to determine the extent of the taking that has occurred." 467 U.S. at 1018 n.21. The executive agreement in *Dames & Moore* established a temporary Iran-United States Claims Tribunal to conduct binding arbitration for resolving claims arising from the 1979 Iranian revolution. 453 U.S. at 664-665. Because the Tribunal was vested with limited jurisdiction, the possibility remained that certain claims outside that jurisdiction might not be adjudicated at all; and it also was alleged that a taking might result if a claimant received less than what he believed to be the full value of his claim. *Id.* at 664-665, 691.

The Compact and Section 177 Agreement at issue here are far different. They respond to the complex, long-term consequences of the nuclear testing program by providing a perpetual source of funding, establishing a diverse com-

pensation plan, and providing for health-care programs, distributions to atolls for a local determination of needs, and a Claims Tribunal to adjudicate individual claims. The Section 177 Agreement itself is an integral and diplomatically vital element of a comprehensive agreement establishing relations between two sovereigns.

Moreover, unlike *Dames & Moore,* which involved allegations of a taking arising out of measures undertaken *by* the United States Government to settle the claims of its own nationals, this case involves a challenge to the espousal by the Government of the Marshall Islands of the claims of its citizens *against* the United States. If petitioners object to the measures their Government undertook on their behalf, their complaint should be directed to the Government of the Marshall Islands. If that Government should conclude in the future that the overall settlement is inadequate, it should advance that position, on behalf of its citizens, on a government-to-government basis, as expressly provided for in Article IX of the Section 177 Agreement (Pet. App. 63a). It would have been inconsistent with the settlement agreement and the sovereign status of the Marshall Islands in the post-trusteeship era to keep the jurisdiction of the Claims Court available on an open-ended basis to individual Marshallese citizens who seek to challenge their own government's diplomatic undertakings. By contrast, the alternative mechanism established by the Compact and Section 177 Agreement respects the sovereignty and constitutional authority of the Marshall Islands, as well as the capacity of its institutions to determine the nature and dimension of the injuries to person and property that resulted from the nuclear testing program and the continuing and future needs of its people in light of that program and the new status of the Islands.

The wisdom of the alternative mechanism approved by the Government and people of the Marshall Islands and the President and Congress of the United States also must

be considered in light of the long history of ex gratia compensation accepted by petitioners; past waivers of claims given in connection with those payments; the numerous legal, evidentiary, and practical obstacles petitioners faced in recovering on their claims in United States courts; and the questionable suitability of traditional lawsuits to address the impact that the nuclear testing program had on entire communities. Compare *Dames & Moore,* 453 U.S. at 687. As the Claims Court found, petitioners' claims, which would have required each individual petitioner to prove ownership of specific Marshall Islands property, its valuation, and the amount of compensation which should be paid, "involve[d] substantial evidentiary problems" (Pet. App. 58a). Moreover, the United States had raised substantial legal arguments against petitioners' claims, including that the Fifth Amendment's Just Compensation Clause was inapplicable under the United Nations Trusteeship system, that the circumstances did not give rise to implied-in-fact contracts, and that petitioners' claims are barred by the statute of limitations. Although the Claims Court rejected some of those defenses in some of the individual cases below, petitioners faced the risk that those defenses would ultimately prevail. Congress and the Government and people of the Marshall Islands reasonably could conclude that, in light of these considerations, protracted litigation in the Claims Court (and in other courts on related FTCA claims) should not continue to be a source of political, diplomatic, and legal friction in the new relationship of free association.[11]

c. Absent amendment to the Compact by the two governments, the Fund will operate in perpetuity to compen-

[11] The uncertainties occasioned by the novel nature of petitioners' claims also would create substantial problems of valuation if a court were to determine that those claims constituted "property" interests that were "taken" by the statutory provisions requiring dismissal of petitioners' suits.

sate any claims that have arisen or may arise from the testing program; and after 15 years, at least 75% of the proceeds of the Fund must be used to satisfy the requirements of the Claims Tribunal in paying the property and personal injury claims of citizens of the Marshall Islands. The Section 177 Agreement has, to date, functioned precisely as planned. We have been informed by the Department of State that all required payments have been made as scheduled, the Claims Tribunal is sitting, and the Fund continues to generate all necessary proceeds.[12]

Moreover, contrary to the impression left by petitioners' submission (see Pet. 3-4 & n.7), the Claims Tribunal in the Marshall Islands is not the only source of funding for payments to persons, such as petitioners, who were affected by the nuclear testing program. The substantial amounts that will be paid to the Distribution Authorites over the first 15 years that the Section 177 Agreement is in effect may be used to make per capita payments to individuals, including a substantial number of the petitioners herein, and reports filed with the Department of State show that many such per capita payments are regularly being made. Those payments, as well as other benefits furnished to petitioners under the Compact and other assistance programs, would have to be taken into account in determining the adequacy of the total compensation that petitioners and others will receive for any injuries and losses resulting from the nuclear testing program.

It is perhaps conceivable that even the continuous-funding mechanism provided by the Compact could prove in-

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[12] We have been informed by the Department of State that of the initial $150 million paid to the Fund, $18 million was applied immediately to meet first year program distribution requirements. Investment of the remaining $132 million has generated sufficient proceeds so that, even after an additional 1½ years of program distributions, the Fund's principal has increased to $142 million, and it is expected to reach the original $150 million amount in the near future.

adequate to satisfy future needs, should radical long-term investment difficulties develop for the Fund or if there are substantial unforeseen claims. Such contingencies, however, are highly remote and speculative. By contrast, the permanent Fund in fact is operating and is furnishing a mechanism for the payment of claims. Moreover, petitioners themselves recognize that Congress need not address a future compensation shortfall only through a judicial Tucker Act remedy, but may adopt some other equivalent remedy. In the context of the complex needs addressed by the Section 177 Agreement, that remedy could take many forms. Congress, in consultation with the Marshall Islands Government, could determine that more funds should be provided for medical programs or radiological monitoring, or for direct payment to atoll distribution authorities, or to the Claims Tribunal for claims awards. Congress thus could simply increase funding under the already-established compensation structure.[13] Alternatively, Congress could provide other remedies for categories of claims that it determines not to have been

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[13] The "Changed Circumstances" provision, contained in Article IX of the Section 177 Agreement (Pet. App. 63a), contemplates that approach. It states that "[i]f loss or damage to property and person of the citizens of the Marshall Islands * * * arises or is discovered after the effective date of this Agreement," rendering it "manifestly inadequate," the Marshall Islands "may request that the Government of the United States provide for such injuries by submitting such a request to the Congress" (*ibid.*). While such a request would not be binding on Congress (*ibid.*), Congress, in approving Article IX, recognized its continuing role in assuring that the Section 177 Agreement provides full compensation. The Senate floor manager of the Compact stated as to this provision: "[T]here is a continuing moral and humanitarian obligation on the part of the United States to compensate any victims—past, present or future—of the nuclear testing program. For this reason, I fully expect that if new claims develop Congress should and will provide any assistance required, absent compelling contradictory evidence." 131 Cong. Rec. 32,101 (1985).

compensated under the Section 177 Agreement. It would, however, be wholly premature to require Congress to make such a determination at this point. And no decision of this Court requires Congress to do so now, as a condition to implementing a settlement in the unique and difficult circumstances to which the Compact of Free Association was addressed.

3. Finally, even if petitioners were correct that Congress intended (or the Constitution requires) the jurisdictional bar to be conditioned upon a judicial determination of the validity of the espousal, the judgment of the court of appeals is correct. Petitioners concede (Pet. 12) that espousal is a recognized mechanism for settling claims under international law and that if the espousal of their claims by the Government of the Marshall Islands was consistent with international law, "then their claims have been validly extinguished." As Chief Judge Wald concluded in her concurring opinion in *Anotolok* (slip op. 19-21), it is clear that petitioners' challenge to the authority of the Government of the Marshall Islands to espouse their claims does not furnish a basis for setting aside the claims-settlement agreement.

The Republic of the Marshall Islands gradually assumed sovereign authority over the Marshall Islands from the early days of the Trusteeship until, through constitutional self-government, it became the legally recognized successor to the former Trust Territory Government (Pet. App. 34a). During the Trusteeship period, Marshall Islands residents were "citizens of the Territory, not of the United States" (*Porter* v. *United States,* 496 F.2d 583, 588 (Ct. Cl. 1974), cert. denied, 420 U.S. 1004 (1975)), and they "now are citizens of the [Republic of the Marshall Islands], a state whose capacity for self-government is officially recognized" (Pet. App. 34a). As the successor government, whose sovereignty petitioners no longer challenge, the Government of the Marshall Islands has full

authority under longstanding principles of international law and custom to espouse and settle its citizens' claims. L. Henkin, *Foreign Affairs and the Constitution* 262 (1972), cited in *Dames & Moore* v. *Regan,* 453 U.S. at 679; Kelso, *Espousal: Its Use in International Law,* 1 Ariz. J. of Internat'l and Comp. Law 233, 234 (1982); I. Brownlie, *Principles of Public International Law* 481-482 (3d ed. 1979).

Petitioners objected below to the espousal on the ground that it did not conform to the principle of continuity of nationality, which is intended to prevent abuses of the espousal process that could result from the assignment of claims to persons who are nationals of another, perhaps stronger, nation. As Chief Judge Wald explained, however, even as a matter of international law and custom, that principle is no obstacle to the espousal here, because the claims have at all times been held by citizens of the Republic of the Marshall Islands or its predecessors, and have been espoused by the official representatives of those citizens. Moreover, the principle of continuity of nationality is essentially a defense that may be raised by the foreign State against which claims are espoused, not a basis for a citizen to object to espousal by his own government. *Antolok,* slip op. 21-22 (Wald, C.J., concurring). Congress has the constitutional authority to waive available defenses pursuant to its power "to pay the Debts * * * of the United States" (U.S. Const. Art. I, § 8, Cl. 1). See *United States* v. *Sioux Nation of Indians,* 448 U.S. 371, 395-407 (1980).

In any event, a court may not invalidate an Act of Congress because of its own view that the Act does not fully conform to international law and custom; it may invalidate an Act of Congress only if it does not conform to the Constitution of the United States. *Antolok,* slip op. 19-21. Here, Congress properly could determine that it should approve a settlement based on the well-established practice

of espousal, as adapted to the special circumstances of the Marshall Islands and as an incident to entering into a new relationship with them.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is disqualified in this case.

## APPENDIX

Section 177 of the Compact of Free Association between the United States and the Government of the Marshall Islands, as enacted by Title II of the Compact of Free Association Act, Pub. L. No. 99-239, 99 Stat. 1812, provides:

> (a) The Government of the United States accepts the responsibility for compensation owing to citizens of the Marshall Islands, or the Federated States of Micronesia (or Palau) for loss or damage to property and person of the citizens of the Marshall Islands, or the Federated States of Micronesia, resulting from the nuclear testing program which the Government of the United States conducted in the Northern Marshall Islands between June 30, 1946, and August 18, 1958.
>
> (b) The Government of the United States and the Government of the Marshall Islands shall set forth in a separate agreement provisions for the just and adequate settlement of all such claims which have arisen in regard to the Marshall Islands and its citizens and which have not as yet been compensated or which in the future may arise, for the continued administration by the Government of the United States of direct radiation related medical surveillance and treatment programs and radiological monitoring activities and for such additional programs and activities as may be mutually agreed, and for the assumption by the Government of the Marshall Islands of responsibility for enforcement of limitations on the utilization of affected areas developed in cooperation with the Government of the United States and for the assistance by the Government of the United States in the exercise of such responsibility as may be mutually agreed. This separate agreement shall come into ef-

fect simultaneously with this Compact and shall remain in effect in accordance with its own terms.

(c) The Government of the United States shall provide to the Government of the Marshall Islands, on a grant basis, the amount of $150 million to be paid and distributed in accordance with the separate agreement referred to in this Section, and shall provide the services and programs set forth in this separate agreement, the language of which is incorporated into this Compact.

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